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IN THE

Supreme Court of the United States

No. 141 Term, 1950.

PAUL A. PORTER, Administrator, Office of Price Administration, now UNITED STATES OF AMERICA,
Appellee,

vs.

SUNSHINE PACKING CORPORATION OF PENNSYLVANIA,
Appellant.

From The District Court of the United States for the Western District of Pennsylvania at 2869 (Civil Action)
And
The United States Court of Appeals for the Third Circuit at No. 9841.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

JURISDICTIONAL STATEMENT APPENDED.

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SUBJECT INDEX.

PAGE

Petition for Review on Writ of Certiorari of a Decision of United States Court of Appeals for the Third Circuit 1

Exhibit "A"—Excerpt from the Opinion of Leahy, District Judge 5

Brief in Support of Petition for Review on Writ of Certiorari of a Decision of United States Court of Appeals for the Third Circuit 7

Jurisdictional Statement 12

Question II 12

CASES CITED.

Shrier v. U. S. 14

Suwanee Fruit and Steamship Co. v. Fleming..... 14

STATUTE.

Section 1254 United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928, annotated in 28 United States Code Annotated, Page 42..... 12

MISCELLANEOUS.

20 American Jurisprudence 46, 47 14

20 American Jurisprudence 49, 50..... 14

20 American Jurisprudence, P. 119.....8, 14

31 C. J. S. 510, 511, 512, 545, 544..... 14

31 *Corpus Juris Secundum,* PP. 557-558..... 8

31 *Corpus Juris Secundum,* PP. 558-559..... 8

Pages 54 and 55, Endlich on "Interpretation of Statutes" 10

General Maximum Price Regulation, 7 Fed. Reg. 3153 9

MPR 185, 7 Fed. Reg. 5772.....5, 9, 10, 11

MPR 306, 8 Fed. Reg. 1114 .....6, 10, 11, 14

MPR 409, 8 Fed. Reg. 8353.....5, 9, 10

15 R. C. L. 1191 14

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To the Honorable the Justices of the Supreme Court of the United States:

The petition of the Sunshine Packing Corporation of Pennsylvania, defendant and appellant, respectfully represents the following:

1. Originally this action for $412,213.83 (treble damages) was brought by Chester Bowles, Administrator of the Office of Price Administration, against the Sunshine

Packing Corporation of Pennsylvania in the District Court of the United States for the Western District of Pennsylvania for alleged violations of OPA ceiling prices in the sales of fruits and fruit juices. By amendment the United States of America is now plaintiff of record and here the appellee.

2. The case was tried before the Honorable Wallace S. Gourley and jury at Erie, Pennsylvania, September 17-25, 1946. The verdict of the jury, upon specific findings of fact, was in part for the plaintiff and in part for the defendant. The verdict of the jury for the plaintiff was in the sum of $7194.16 (single damages) which was doubled by the honorable trial judge on special jury findings that the violations alleged were not wilful but due to negligence. Motion for judgment *non obstante veredicto* having been refused, an appeal was taken from the judgment of $14,388.32, so entered, to the United States Court of Appeals for the Third Circuit which affirmed in part and reversed in part thereby reducing the judgment, as doubled, to $9,370.32. So much of the opinion, (Leahy, District Judge) as deals with the question presented for review is filed herewith as Exhibit "A", opinion being filed April 7, 1950.

3. The United States of America now being plaintiff of record, the action having been upon Acts of Congress and administrative rules and regulations based thereon and the action having been brought in the District Court of the United States for the Western District of Pennsylvania, there is involved no question as to the jurisdiction of the Supreme Court of the United States upon appeal.

4. The concrete question presented for review and for argument, if appeal is allowed, is the following:

(a) Where a statute or governmental rule or regulation with the force of a statute, dealing with the cost, processing and sale of a commercial commodity, is silent as to the method of cost computation, can a governmental accountant arbitrarily reject the time honored custom of considering the "yield" (or conversely "wastage") of the particular commodity (here fruits) and eliminate that factor as an essential of proper and fair cost calculation?

(The District Court and the United States Court of Appeals decided he could).

As corollaries to the above are the following:

(b) Is an attack on a method of cost computation which eliminates "yield" (or conversely "wastage") in effect an attack on the validity of the law, rule or regulation (here OPA regulation) so as to compel a District Court to divest itself of jurisdiction in favor of the Emergency Court of Appeals, specifically constituted by Act of Congress to adjudicate the validity of OPA rules and regulations?

(The District Court and Court of Appeals decided this affirmatively).

5. The special and important reasons urged for the allowance of appeal, in addition to the actual money involved are:

(a) The method and manner of governmental cost computation in this case, as approved by the District Court and Court of Appeals, can become a dangerous and upsetting precedent generally because it repudiates the time honored custom of considering "yield" (or conversely "wastage") as one of the primary elements in figuring costs and so could have a most disrupting effect in all cost accounting not only in

cases *sui generis* but in income tax cases and in other situations where this particular factor is involved.

(b) In arriving at its decision on the question here presented for review the District Court denied to defendant and divested itself of jurisdiction to pass upon a question properly justiciable before it and in favor of the Emergency Court of Appeals by holding that an attack on a method of cost calculation was, in effect, an attack on the validity of the maximum price regulation itself which, it is submitted, is a *non sequitur* as defendant, at no time, has had any quarrel with the maximum price regulation, as such, and had no way of knowing how costs were to be figured under it by the governmental accountant assigned to the case and under these circumstances how would defendant have had any standing to appeal to the Emergency Court of Appeals?

WHEREFORE your petitioner respectfully prays your Honorable Court for allowance of review on a writ of certiorari.

S. Y. ROSSITER,
Attorney for Petitioner.

County of Erie,
State of Pennsylvania. } ss.:

Before me, the subscriber, personally came FRED L. RAHAL, who being duly sworn according to law deposes and says that he is president of the defendant company, petitioner, and as such is authorized to make this affidavit on its behalf; he is familiar with the facts hereinabove set

forth and that the same are true and correct to the best of his knowledge, information and belief.

FRED L. RAHAL,
President of Sunshine Packing Corporation of Pennsylvania.

Sworn and subscribed to before me
this 14th day of June, 1950.
Gertrude Gross,
Notary Public.
My Commission expires January 7, 1953.

(Notarial Seal)

Exhibit "A".

2. The question here is whether the Court below was correct in holding that MPR 185 covering strawberry and black raspberry juice, and MPR 409 covering currants, were silent on the necessity of including in cost computations the factor of yield (or conversely, the wastage) in the processing of the fruits involved between the time they left the field where they were harvested and were finally sold. The Court below held such computation should not be included in the calculations fixing ceiling prices. Appellant urges that this ruling was error for two reasons: (1) the regulations did require that yield be calculated as an element of cost price for ceiling purposes and (2) even if the regulations were silent, judicial notice must be taken of the universal acceptance of the factor of yield in cost computations. Hence it is urged, the regulations implicitly included yield as a factor in determining ceiling price. This is the crux of appellant's case for it hammers the

point that "yield" or "wastage" plays an important part in arriving at the actual cost of its products; and that wastage always occurs between the time the appellant receives its food products and the time the processed products are ready for marketing. In support of this argument appellant states that OPA itself has recognized that yield and wastage may be considered in the computation of cost in the manufacturing industry. But, the regulation to which reference is made—MPR 306—admittedly is not involved in the instant case. As a general proposition, we agree that yield is always an item of cost; however, the regulations involved in the case at bar are silent on the matter. This particular attack, on the failure of the regulations to provide that "yield" or "wastage" should be taken into account in fixing prices after the base period, goes to validity of the regulations as they existed in point of time when appellant was selling its products. As stated above, on the authorities cited, the regulations must be treated as valid until declared invalid by the special court. (Emergency Court of Appeals). (Italicized designation supplied).

BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

If allowed to stand, the decision in this case can be most disruptive of time-honored, well recognized and accepted business and accounting practices, not only in governmental purposes but in commercial accounting generally, because judicial sanction is here given to a governmental accountant working under an administrative regulation, with the force and effect of an Act of Congress, computing costs, arbitrarily as he sees fit, by leaving out a very elemental and substantive factor, viz: "YIELD" (or conversely, "wastage") and justifying the same by saying that the regulation in question was silent on whether "YIELD" should or should not be included in cost calculation.

As succinctly stated in the opinion of the United States Court of Appeals for the Third Circuit and quoting, *ipsissimis verbis,* the legal position of petitioner on this question is two-fold:

> "(1) The regulations did require that yield be calculated as an element of cost price for ceiling purposes and
>
> "(2) Even if the regulations were silent, judicial notice must be taken of the universal acceptance of the factor of yield in cost computations."

In view of the fact that the latter of the above two is the more general and comprehensive, it will here be discussed first.

It would be "carrying coals to Newcastle" to here regale this Honorable Court in detail, with the principles of judi-

cial notice. However, for ready reference, and, as pertinently serving out immediate purpose, we will utilize the following:

> Judicial notice is taken of the general usages and customs of the country, particularly the general and well known mercantile customs and usages and the general business methods and practices.
>
> 20 American Jurisprudence, P. 119.
>
> Judicial notice will also be taken of matters of common knowledge concerning the raising and marketing of farm products.
>
> 31 *Corpus Juris Secundum,* PP. 557-558.
>
> Within these general rules judicial notice has been taken to particular matters relating to * * * *, citrus fruit, and of particular matters relating to * * * fruit growers * * *.
>
> 31 *Corpus Juris Secundum,* PP. 558-559.

Surely it needs no extended argument to demonstrate that the "yield" or, conversely, the shrinkage and wastage in fruit between its harvesting and its marketing, after its processing, is a matter of such common knowledge as to be squarely within the purview of the above quoted excerpts. The approximate percentage of "yield" was proven by defendant's evidence as to each item here involved and if "yield" had been allowed no verdict could have been rendered for the plaintiff as to such items for the reason that such added costs would then have justified defendant's sale price of these particular items under their respective OPA regulations.

The importance and, indeed, the danger, of the decision in this case, as it now stands, is that it is of general application. The tailor using four yards of cloth out of a five yard bolt to make a suit of clothes could not take into ac-

count the yard he lost; the carpenter cannot charge for his sawed off boards, in fact, every processor or manufacturer of a raw or basic commodity could be stuck with the loss resulting from the normal manufacturing shrinkage and wastage of his product.

It is our contention that any statute or regulation with the force thereof cannot strike down a universal business practice of long standing without express language to that effect or by inference so plain and clear as to be equivalent thereof and that silence gives consent and not dissent.

In conclusion on this point it is respectfully submitted that while the Office of Price Administration may be largely a thing of the past yet the business accounting principle, here judicially sanctioned, can be a poisonous legacy if allowed to stand.

Now taking up the first legal position enunciated that the maximum price regulations here involved (abbreviated for convenience and designated MPR 185, 7 Fed. Reg. 5772 and MPR 409, 8 Fed. Reg. 8353), require that "yield" be calculated as an element of cost pricing for ceiling purposes, the argument becomes more technical and involved. In discussing the same we will endeavor, as best we can, to follow the spirit of the rule of this Honorable Court that this argument shall be brief.

By the way of background, however, and to make the same understandable it is necessary to say that under congressional legislation the first general and omnibus OPA price regulation was "General Maximum Price Regulation," commonly designated GMPR, 7 Fed. Reg. 3153, which froze all prices as af March 1942 and which necessarily left the matter of price calculations in *status quo*. As time and investigation developed the need of specific treatment for specific commodities the latter were with-

drawn from the provisions of GMPR and became the subject matter of special price regulations and so MPR 185, applying to canned fruits, and MPR 409, applying to frozen fruits, were duly born during the year of 1942 and subsequently MPR 306, 8 Fed. Reg. 1114, became the successor and the 1943 edition of MPR 185.

When OPA was in the early stages of its enormous task the scope of its work necessarily had to be of general nature rather than specific and, consequently, for the early MPR 185 no price formulas or guiding forms were worked up by OPA in detail so that fruit canners naturally and necessarily had to rely on the previous general business customs and practices in that business and the same would hold true as to MPR 409. While it is here conceded that the word "yield" does not specifically appear in either and while we will not encumber this argument with their full repetition yet it is submitted that a fair reading of them in the Federal Register, at the citations hereinabove given, will fully support the contention of the Petitioner-Appellant in this case.

By the time that MPR 306 came into being in 1943 there had then been afforded to OPA the time to work up specific price formulas and written forms which did specially and specifically provide for the calculation of "yield" with a special column in the particular forms with "yield" as the caption thereof. In the lower Court and upon the Court of Appeals it was the contention of appellant that all these pricing regulations had to be considered *in pari materia*, basing this legal position largely on the following from Pages 54 and 55 from Endlich on "Interpretation of Statutes."

> SEC. 43. EARLIER ACTS IN PARI MATERIA. Where there are earlier acts relating to the same subject, the survey

must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law (a), and each of them may explain and elucidate every other part of the common system to which it belongs.

The Court of Appeals struck down this argument by the simple statement "The regulation to which reference is made—MPR 306—admittedly is not involved in the instant case." True, it is, that no violations of MPR 306 were charged in the complaint but it is earnestly contended that MPR 306 was based upon MPR 185, grew out of it and its 1943 successor and that any interpretation placed by OPA upon MPR 306 necessarily had to relate back to MPR 185. Pricing under one could not be upon a different base or upon a different theory then pricing under the other and that, being *in pari materia*, the formulas and forms under MPR 306 were competent evidence as interpretative of MPR 185, born in the early confusion of OPA and without the luxury of concomitant forms and formulas.

Viewed in this light the conclusion seems almost irresistible, even discounting our enthusiasm for our case, that "yield" should have been calculated in the pricing of the three items remaining in this lawsuit and, if so, that portion of the judgment of the United States Court of Appeals for the Third Circuit should be reversed which affirmed the method of calculation of which complaint is here made and appeal allowed for urging the foregoing position before this Honorable Court.

Respectfully submitted,

S. Y. Rossiter,
Attorney for Petitioner-Appellant.

Jurisdictional Statement.

(a) Jurisdiction of The Supreme Court of The United States under Section 1254 United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928, annotated in 28 United States Code Annotated, Page 42.

(c) The date of judgment sought to be reviewed is April 7, 1950.

The question here involved is substantial in amount and also substantial by reason of the fact that if the decision is allowed to stand it can be disruptive of general accounting practices.

Copy of the opinion of the learned lower Court (District Court of Pennsylvania for the Western District, Honorable Wallace S. Gourley) as same pertains to the question here involved is as follows. The portion of the opinion of the United States Court of Appeals for the Third Circuit is appended to the Petition as Exhibit "A."

Question II.

That as to strawberry juice, black raspberry juice and currants, the court erred in not directing a verdict for the defendant for the reason that the percentage of yield in the case of each of said items should have been computed and included in the calculations as to ceiling prices.

It is in substance the contention of the defendant that the proposition of "yield" or, conversely, of "wastage" and the part that yield and wastage play in the computation of cost is of such major importance that the district court should take judicial knowledge of settled business practices as to the part which yield or wastage plays in arriving at the actual cost of a product. That wastage or yield

must occur between the time that the defendant receives the agricultural commodities or food products and the time that the finished or processed product is ready for selling or marketing. That in the coring, peeling, stemming, culling, leavening and other debris which must be done in order to have the finished or processed product available for sale, a direct cost is involved which should be considered in computing the selling price. That the Court should take judicial notice of the fact that in calculating costs in accordance with customs from time immemorial, wastage must be calculated to arrive at true cost. That since the government's regulation contained no proviso as to the consideration of yield or wastage in the computation of the ceiling price, the failure to have such inclusion in the regulation amounted to the government consenting and recognizing that yield or wastage should be included. That in every manufacturing industry the cost of raw materials and wages are the outstanding elements in the conversion of the raw materials into finished products, yet just as elemental and fundamental are such factors as yield or wastage.

The defendant says in brief that the Court should take judicial notice of the custom which exists in the computation of cost, and that since the regulations was silent as to including yield in the computation of cost, the Court should consider the custom as part of the regulation.

Judicial knowledge may be defined as the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because they are already known to him or because of that knowledge which a judge has, or is assumed to have, or merely another way of expression that the usual forms of evidence will be dispensed with if the fact is one of such public concern or notoriety which is known generally

by all well-informed persons. As has been said, judges will not shut their minds to truths that all others can see and understand. 15 R. C. L. 1191; 20 American Jurisprudence 46, 47; 31 C. J. S. 510, 511, 512, 545, 544; 20 American Jurisprudence 49, 50.

A custom of business in a specific trade is a matter of judicial cognizance if it is sufficiently notorious. 20 American Jurisprudence 119.

In addition to the foregoing, the defendant contends that even if the district court does not believe that judicial notice should be taken of the custom and usage in the manufacturing industry, yield and wastage should be considered in the computation of cost since the Office of Price Administration at the time MPR 306 was issued, which was not involved in this action in any way whatsoever, provided for the consideration of yield or wastage in computing cost. That since MPR 306 is so similar to the other regulations involved, with the exception of the provisions as to yield or wastage being considered in the computation of costs, they should be *in pari materia.*

Unquestionably, the argument presented to the Court involves the consideration of a matter that generally is acceptable in business as an important part of the actual cost of the processed or manufactured article or commodity. However, this question, in my judgment, again goes to the validity of the regulations which are involved, and it is the duty of the district court to treat the regulations as valid unless and until declared invalid by the Emergency Court of Appeals or the Supreme Court. *Suwanee Fruit and Steamship Co. v. Fleming, supra; Shrier v. U. S., supra.*

S. Y. Rossiter,
Attorney for Petitioner-Appellant.